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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 391

RAILWAY EXPRESS AGENCY, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, AIR FREIGHT FORWARDERS ASSOCIATION, AMERICAN AIRLINES, INC., UNITED AIR LINES, INC., TRANS WORLD AIRLINES, INC., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS AMERICAN AIRLINES, INC., UNITED AIR LINES, INC. AND TRANS WORLD AIRLINES, INC. IN OPPOSITION

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August 23, 1965

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QUESTION PRESENTED

Is an order of the Civil Aeronautics Board (the Board) disapproving agreements between a surface carrier and certain air carriers as being in violation of the Federal Aviation Act of 1958 (the Act) a valid

exercise of the powers and duties of the Board under Section 412 of the Act, 72 Stat. 770, 49 U.S.C. 1382, when undisputed facts before the Board show that under the agreements the surface carrier would hold out to the public common carrier services in air transportation, although it holds no license under the Act thus to operate as an indirect air carrier?

COUNTERSTATEMENT OF THE CASE

The decision below does not involve the several questions stated by the Petitioner (hereinafter sometimes called REA) but simply upholds the validity of an order of the Board. As the decision below states:

> "In this case the Board found, upon substantial evidence, most of which was submitted by REA at the Board's invitation, that REA's operations under the proposed agreements would constitute indirect air carriage. Since REA is not authorized to carry on such operations, approval of the agreements was properly withheld." (345 F.2d at 448-449; Petition, Appendix B, p. 32)

REA lacks authority from the Board to operate as an indirect air carrier. Under the statute and the Board's decisions, an indirect air carrier is one who holds itself out to the public as undertaking to perform air transportation, through arrangements with others who directly operate aircraft.

The undisputed evidence submitted by REA is that it would operate as an indirect air carrier under the agreements in question. The Board so found. The consequent violation of the Act required disapproval of the agreements, and the Board so ordered. The decision below affirmed that order. It rejected the con-

tention of REA that Section 1003 of the Act, 72 Stat. 791, 49 U.S.C. 1483, overrides the requirement that indirect air carriers apply for and receive authority from the Board to act in that capacity.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Petitioner REA is a surface carrier controlled by other surface carriers—the nation's railroads. It operates as a carrier of surface express shipments, and as a carrier of air express under license from the Board which all parties concede does not cover the transportation here under review. REA has at various times applied for authority to operate as an indirect air carrier of air freight but these applications have been denied in view of REA's unique status as the air express carrier and its surface carrier operations and ownership.

Under the agreements which the Board disapproved REA sought to conduct substantially the same operations for which its applications for license had been denied. Because the agreements use the terms "through service" and "joint rates" REA asserted that the Board was without authority in the matter, although REA without license for air transportation actually held itself out to the public to perform the entire transportation, including any air transportation.

A. The Order Affirmed Below Raises No Question of General Application

The order disapproving the agreements and its affirmance in the decision below were plainly required by the licensing provisions of the Act and the requirement of Section 412, 72 Stat. 770, 49 U.S.C. 1382, that any agreement in violation of the Act be disapproved.

The decision is uniquely applicable to REA and it has no general effect on the relationships between air carriers and other surface carriers.

There is no serious question and no conflict between decisions on the point that when the Board interprets and applies the statute which it administers "the reviewing court's function is limited" and "all that is needed to support the . . . [agency's] interpretation is that it has 'warrant in the record' and a 'reasonable basis in the law'" *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 153-154 (1946); *NLRB* v. *Hearst Publications,* 322 U.S. 111, 130-131 (1944); *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125 (1939); see also *American Airlines* v. *CAB,* 178 F. 2d 903, 908-10 (7th Cir. 1949). In response to requests by the Board, REA submitted information concerning details of its operations under the agreements. There was no dispute as to the accuracy of this evidence, nor as to the information relating to REA's surface and air express operations.

On the basis of this undisputed evidence the Board reached conclusions of fact and ruled on the contentions of the parties. As stated in the decision below:

> "REA contended before the Board that the agreements were simply contracts between itself (a surface carrier subject to regulation by the Interstate Commerce Commission) and a specific air carrier for through service and joint rates, and that such contracts were clearly authorized under Section 1003 of the Federal Aviation Act. The Board concluded, however, that the operations of REA under the proposed agreements would not be those of a joint carrier of through traffic, but rather that the agreements called for REA to

undertake indirectly to engage in air transportation—an undertaking which requires Board authorization not presently held by REA." (345 F. 2d 447-8; Petition, Appendix B, pp. 29-31).

The undisputed evidence showed that the shipping documents, REA's advertising and publicity, and all aspects of the relationship between REA and the public would create the impression that REA undertook performance of the entire transportation—including any air transportation—just as it does in its air express services which it is authorized to perform. Whether air transportation would be used, and if so, what direct air carrier would perform it, would be decided by REA. These arrangements constitute indirect air transportation such as air freight forwarders are authorized to perform and not merely through services and joint rates.

The decision below affirmed the Board's application to these facts of the clear requirements of the statute. Section 101(3) of the Act, 72 Stat. 737, 49 U.S.C. § 1301(3), provides that one "who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation" is an air carrier; and Section 401 (a), 72 Stat. 754, 49 U.S.C. § 1371(a), prohibits any air carrier from engaging in air transportation without a certificate issued by the Board. REA holds no such certificate, and no exemption from that requirement with respect to services under the agreements. Disapproval of the agreements as violating the Act inevitably followed.

The decision and the Board's order which it affirms do not establish any new doctrine, principle or proposition. They apply clear statutory requirements to a company and to agreements which are unique.

B. The Decision Does Not Foreclose Proper Use of Through Routes and Joint Rates

The Board's conclusion and the consequent disapproval of the agreements do not present any "dilemma" for surface carriers, as REA claims in its petition. Through service and joint rates of air and surface carriers remain in effect. Questions concerning such rates may still be referred to a joint board consisting of members of the Interstate Commerce Commission and the Civil Aeronautics Board under Section 1003 of the Act, 72 Stat. 791, 49 U.S.C. 1483.

Encouragement of through routes and joint rates does not require, or even suggest, that mere use of those words authorizes surface carriers to hold themselves out to the public as performing air as well as surface carriage. So long as each type of carrier stays within the function for which it is licensed, and does not represent to the public that it alone is the carrier by both means of carriage, through services can be and are offered and performed without violence to the purpose or the form of the statute. The decision affirmed below does not (as the petition asserts) foreclose collaboration between air and surface carriers, nor does it foreclose regulation by joint boards. It only foreclases REA's use of that terminology to evade the basic licensing requirements of the Act.

Numerous joint rates have been filed by air carriers and carriers subject to the Interstate Commerce Act. Agreements providing for such joint rates are filed with the Board, and when they do not provide or contemplate that the surface carrier will hold out the

entire through service—including the air transportation—as its own, such agreements are approved by the Board. There is no problem of general application involved in REA's inability to proceed as it desires without the authorization which the statute requires.

C. No Question of Denial of Due Process of Law Is Properly Raised by the Petition

The Board received and considered all contentions, views and facts which REA wanted considered. REA made five separate submissions to the Board over a period of 2½ years. Section 412 of the Act, 72 Stat. 770, 49 U.S.C. 1382, under which the order was issued, does not require a hearing—and certainly not an oral or evidentiary hearing.

The only differences between the parties below revolved around the application of the law to the admitted facts. The facts upon which the Board's order rests—the terms of the agreement and the actual procedure followed thereunder—were and are not in dispute. They were set forth in the REA submission.

It is well settled that in this situation due process is satisfied by written submissions, and that no trial-type hearing nor oral argument is required. *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 108 U.S. App. D.C. 284, 281 F. 2d 919 (1960), *cert. den.* 365 U.S. 827 (1961); *Sun Oil Company* v. *Federal Power Commission,* 256 F. 2d 233 (5th Cir. 1958), *cert. den.* 358 U.S. 872 (1958); *Producers Livestock Marketing Association* v. *United States,* 241 F. 2d 192 (10th Cir. 1957); *Riss & Co.* v. *United States,* 117 F. Supp. 296 (D. Mo. 1952), *aff'd* 346 U.S. 890 (1953).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27-35) is reported at 345 F. 2d 445. The findings and orders of the Civil Aeronautics Board (R. 174-190, 247-254) are not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1965, and a petition for rehearing was

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[1] "R" citations herein are to pages of the printed Joint Appendix to briefs in the court below, copies of which have been filed by petitioner in this Court.